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No. 92-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GERALD J. GARNER,

Petitioner,

—v.—

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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QUESTIONS PRESENTED

In a state disbarment proceeding against petitioner, a federal employee appeared voluntarily as the sole witness in support of the proposed disbarment, and the principal documents introduced against petitioner were from the federal agency's files. Petitioner subpoenaed other agency documents; there was no motion to quash, but the agency did not comply with the subpoena. The judicial officer presiding did not order compliance with the subpoena, and allowed the witness to refuse to answer cross-examination questions, attempting neither to persuade nor to coerce the witness to answer but leaving the direct testimony to stand as the basis for disbarment. The questions presented are:

1. Whether the claim of privilege by the subordinate employee was properly sustained under the principles of this Court's relevant decisions.

2. Whether the resulting restriction of cross-examination, while leaving the direct testimony standing, denied petitioner the due process of law required by the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

Petitioner, Gerald J. Garner, petitions for a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Department, confirming the Report of the Referee and ordering petitioner disbarred. The Court of Appeals of the State of New York dismissed petitioner's appeal as of right without reaching the merits of the case, upon the ground that the appeal presented no substantial constitutional question directly involved, and denied petitioner's alternative motion for leave to appeal.

OPINIONS BELOW

The Report of the Referee, which is unreported, is reprinted in the Appendix at 1a-11a. The *per curiam* Opinion & Order of the Appellate Division, Second Department, (12a-

15a), is reported at 176 A.D.2d 26, 580 N.Y.S.2d 59 (1992). The Orders of the Court of Appeals of the State of New York (16a-17a) are reported at 80 N.Y.2d 917 (1992).

JURISDICTION

The Order of the Appellate Division, Second Department, was entered on February 10, 1992. The Orders of the New York Court of Appeals were entered on September 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that no State shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This petition arises from a state grievance proceeding that resulted in an order of disbarment. The sole witness against petitioner was a federal agency employee, appearing by voluntary arrangement, who answered all questions put to him by the prosecuting agency but refused to answer a number of cross-examination questions on grounds that his authority to appear and testify did not permit him to respond. The grievance proceeding had sprung from communications between the federal agency and the Grievance Committee for the Ninth Judicial District of the State of New York (the "Grievance Committee"); as recounted by the respondent Grievance Committee, its complaint against petitioner was "[b]ased upon information supplied to . . . the Committee" by

an employee of the federal agency.[1] Nevertheless, the Referee sitting as the judicial officer to hear the evidence neither (i) urged the single prosecuting witness from the federal agency to answer, (ii) attempted to coerce answers, nor (iii) struck the direct testimony because of the refusal to submit to cross. Further, the Referee deemed himself powerless to enforce a subpoena for documents served by petitioner upon the agency, regarding which there had been no motion to quash. These circumstances generate the questions tendered for review.

Background - The First Grievance Proceeding

Petitioner was admitted to the New York bar on March 29, 1961. After practicing law for some 22 years with an "unblemished record," as a Referee later found, compiling an "impressive record of communal activities" in charitable, professional *pro bono*, and other public service work, he became the subject of a disciplinary proceeding. In February 1975, for the sole purpose of assisting adoptive parents to remain anonymous from the natural mother, with the full knowledge of the California hospital from which the adoption was being made, and for no personal gain to himself, petitioner submitted a document containing fictitious names for the adopting parents. (Apparently, petitioner told the nurse taking the paper in question that he would give her only fictitious names; she accepted this as satisfying the "technicality" with which she was complying.) Though no one was injured, on October 1, 1984, petitioner was ordered suspended from the practice of law for a period of one year

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[1] Memorandum Supporting Motion to Confirm Referee's Report 3-4.

commencing November 1, 1984, ultimately effective January 5, 1985.[2]

That year petitioner moved to California, where his habits of community service have continued. He has no intention to return to, or practice law in, New York. Instead, he has earned his living in banking, becoming chief executive officer of a significant and successful national bank. As a result of the second grievance proceeding involved here, the one-year suspension was extended into the 1990s, ending on February 10, 1992, with the order of disbarment now in question.

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[2] The Special Referee hearing the matter had found as "OTHER MITIGATING FACTORS":

> 1. The submission of the false document (Charge One) appears to be an isolated instance. Counsel for Petitioner stated that there were "no other documents where there are fictitious names to their knowledge" (193) see also 432.
>
> 2. The hospital accepted Petitioners [sic] Exhibit One, knowing that the names were false.
>
> 3. There is no evidence that Respondent profited monetarily from this deception.
>
> 4. I believe that he was motivated solely by a desire to preserve the anonymity of the adopting parents.
>
> 5. There is no evidence in this record that anyone was actually damaged by submission of the false document.
>
> 6. He eventually did disclose the true names to the authorities.
>
> 7. His otherwise unblemished record (so far as the evidence before me revealed) of more than twenty years at the Bar.

Institution of the Second Proceeding

Late in 1985 an attorney in the Office of the Comptroller of the Currency ("OCC") advised the Grievance Committee that two documents filed with the OCC by petitioner -- one in July 1983, the second in September 1984 -- had failed to disclose the facts concerning the first grievance proceeding. Almost three years later, in April 1988, the Grievance Committee commenced this proceeding, alleging that the two statements had been false and that by filing them petitioner had violated the disciplinary rules.

Sufficiently summarized for present purposes, petitioner's defenses included, *inter alia*, a denial that the first document had been false at all;[3] an assertion that the inaccuracy of the second document had been the result only of inadvertence;[4] and, more broadly, a contention that the OCC had at all material times been advised fully of the material facts in oral

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[3] The first paper, submitted to the OCC in July 1983 for approval of petitioner's functioning as an "organizer" and "director" of a proposed national bank, called for information as to any "disciplinary proceedings," giving as examples "Disbarment, censure of conduct, revocation of license, etc." There had at the time been no disposition of the first proceeding; petitioner, who has stated that he acted on advice of counsel, wrote "NONE," but then added, on his own second thought, "except for nominal fee dispute inquiries and a 1975 question of whether or not there was a violation of compact law, all of which have resulted in no action." The reference to the "1975 question . . . of compact law" was to the adoption matter, in which a pending charge, later dismissed, involved alleged violations of an Interstate Compact on the Placement of Children.

[4] Petitioner testified that this September 1984 filing, also predating the order of suspension, was supposed to duplicate the first in the relevant portion, but the "except" clause was omitted through a clerical error. Petitioner denied that he made or caused the deletion, pointing out that he would have had no reason to excise information already before the OCC in the 1983 filing (Tr. 253). "Tr." refers to the Referee's Hearing transcript.

interviews that followed the formal paper filings. In support of this position, petitioner pointed out that the OCC, which was fully aware of (and in fact supplying) the evidence in the state bar grievance proceeding, had never moved to rescind the approval of petitioner's bank positions to which the filings related or taken any other adverse action.

The Hearing

The sole witness against petitioner in the hearing on the charges was Donald N. Lamson, Assistant Director of the Securities and Corporate Practice Division of the OCC. He and the OCC supplied substantially all of the documents introduced in support of the Grievance Committee's case. Counsel for the Grievance Committee had arranged in advance for the presentation of this testimony and the exhibits (Tr. 137-38). Prior to taking the stand, when reference was made to petitioner's subpoena calling for OCC documents, Mr. Lamson joined in a colloquy of counsel to tell the Referee there was "substantial case law that in fact shows that the Federal Government is not subject to State Court subpoenas." (Tr. 68-69.) He volunteered that he had brought some documents "in the interests of justice and for the convenience of the parties," but maintained that "the Comptroller's Office is clear that they do not submit to the subpoena itself" (Tr. 69).

Sworn then as a witness, Mr. Lamson testified that he had access to all OCC files relating to national banks (Tr. 72), and that he had "committed . . . to memory" OCC charter application procedures, which appear in a manual "about four inches thick" (Tr. 73). He described the chartering process, and reported that a charter had been issued to the American Commercial National Bank of California ("ACNB") (Tr. 74-75). Mr. Lamson testified that petitioner Garner had been approved as a director of the ACNB after a field interview,

investigation, and submission of a confidential biographical and financial report (Tr. 76-80).

Further investigation was necessary when Garner applied to become the bank's chief executive officer (Tr. 80-82). During his direct testimony, Lamson tendered a redacted OCC memorandum on this subject (Tr. 81-83), noting that he had done the redaction "personally, . . . in light of the office's need to maintain the confidentiality of that information." (Tr. 82.) When petitioner's counsel objected and asked the Referee to look at the unredacted original for voir dire purposes, the Referee declined "to inspect anything that has not been offered and admitted in evidence." (Tr. 82-83.) The witness volunteered that it would be "a violation of Federal law" for him to provide the unedited memorandum, and that he had not brought it with him in response to petitioner's subpoena (Tr. 83-84). He provided the redacted version, he said, as an accommodation, repeating his view that petitioner's subpoena, without a motion to quash, was "not applicable to a Federal Government agency" (Tr. 84).

Mr. Lamson would not say what had been deleted from the memorandum (Tr. 83). When counsel demanded compliance with the subpoena for the original, there having been no motion to quash, the Referee asked:

> The question is, what do you want me to do? Do you want me to have him committed to contempt of this court?

(Tr. 85.) When counsel pressed for an order requiring Lamson to bring the original document, the Referee said he could not do that, and would receive the redacted document in evidence over petitioner's objection:

> He is not going to obey my order because he has already said the Federal agencies are not subject to any [sic] jurisdiction, and he is appearing

only as a Federal agent, and I am not going to make any such order.

I will keep in mind the circumstance that there has been a redaction when I write my eventual report.

In the meantime, I will accept it the way it is.

(Tr. 87.)

Lamson went on to say the exhibit related to petitioner's application to become CEO of the bank and that the OCC had not disapproved petitioner for that post:

Q. So what was contained in this document did not induce you to disapprove him?

A. Exactly.

Q. And that I assume would include whatever material was redacted?

A. Absolutely.

(Tr. 87-89.)

On cross-examination, Lamson was led to acknowledge that his testimony that petitioner's 1984 application had not been disapproved, which was based on the documents he provided, might have been mistaken (Tr. 135-36). It was then established without dispute that the 1984 application about which Lamson had testified did relate to petitioner's becoming president and CEO of the bank, and that the application had in fact been disapproved by the OCC (Tr. 187-88).[5]

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[5] After the bank had been established for over two years and OCC (continued...)

In other cross-examination, Lamson testified that his litigation "counterpart" in the OCC had "instructed" him to ignore the subpoena because an "agreement had been reached that the subpoena would not be enforced since it was a State Court subpoena" (Tr. 106.) Petitioner's counsel denied, and there was never any evidence of, any such agreement (Tr. 86, 107). Asked whether he had brought to the hearing documents responsive to petitioner's subpoena, Mr. Lamson resisted, and the Referee identified the word "responsive" as "a naughty term" (Tr. 112). It became evident that there had not been compliance with the subpoena, in accordance with the witness's position that compliance was unnecessary, and petitioner's counsel protested that the document production had been made "on a selected basis" (Tr. 112-16, 139, 145-46).

Lamson was asked, as the beginning of a line of cross-examination, whether there had come a time when the OCC decided that information in petitioner's filings might have been inaccurate (Tr. 121). He "respectfully" declined to answer. When counsel urged that this went "to the heart of the proceeding," the Referee said he must accept the refusal to answer because he could not compel an answer (*id.*). He added, "And let us not play games." (Tr. 122.) Similar inaction by the Referee followed a further series of refusals to answer questions concerning:

- Contacts between the OCC and the Grievance Committee (Tr. 122-123).
- When OCC had ascertained that information in petitioner's submissions might contain "incomplete or misleading information" (Tr. 123).

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[1](...continued)
approval was no longer required, petitioner came to serve as president and CEO of the bank at various times (Tr. 187-88).

- The circumstances under which the OCC found asserted inaccuracies in the filings (Tr. 125-26).
- What action, if any, was taken by the OCC as a result of information gleaned from the file respecting petitioner (Tr. 126).
- Who at OCC determined that petitioner might have given incomplete or misleading information (Tr. 128).
- Whether there had been any OCC discussions of the biographical information given by petitioner (Tr. 128).
- Whether proceedings had ever been instituted to remove petitioner as the bank's CEO (Tr. 130, 131).
- Whether the OCC had ever sought penalties from petitioner (Tr. 132).
- Whether any cease and desist proceedings had ever been instituted by the OCC against petitioner (Tr. 132).

In the course of Mr. Lamson's refusal to answer cross-examination questions, he mentioned that he had been required to obtain a letter of authorization in order to testify at all. At the request of petitioner's counsel, the letter was marked as an exhibit. Signed by a Senior Deputy Controller for Bank Supervision (Operations), the letter reads as follows:

> Dear Mr. Lamson:
>
> The New York State Grievance Committee for the Ninth Judicial District, in connection with pending disciplinary proceedings against a member of that bar, Mr. Gerald J. Garner, has requested that the OCC provide it a witness to testify concerning the circumstances surrounding the existence of multiple copies of documents

> filed with the OCC and concerning the procedures for seeking approval from the OCC to be a director and/or Chief Executive Officer of a national bank, and the documentation involved in such applications.
>
> You are hereby authorized, pursuant to 12 C.F.R. §§ 4.18 and 4.19, to testify at the hearing concerning this matter with respect to the above-referenced topics.[6]

Counsel for petitioner urged upon the Referee his inability to cross-examine effectively if "any of these areas" remained closed because of Lamson's asserted restriction on his authorization to come voluntarily to testify (Tr. 125). The Referee recognized that the impact, if any, of petitioner's allegedly false statements was indeed "the principal question" in the proceedings (Tr. 126-27). Nonetheless, he declared that "there is no use" and instructed counsel to "move along" (Tr. 127).

The Referee's Report

The Referee, who had been assigned by the New York Appellate Division, Second Department, to "hear and report," issued a Report dated July, 1991 (2a). He noted at the outset as a "troublesome aspect" that the lengthy proceedings had "transformed [petitioner's] 1-year suspension . . . into . . . an

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[6] 12 C.F.R. § 4.18(a) forbids employees to disclose "confidential information," except as authorized. Section 4.19 bars employees "from testifying in court . . . without the prior written authorization of the Comptroller." Neither the letter nor any other document in evidence defines the scope of "confidential information" or states that cross-examination on the topics to which the letter refers should be refused after direct testimony has been given.

almost 7 year suspension." (*Id.*) He urged that the proceedings "be brought to a prompt conclusion" (*id.*).

The Referee found that both the 1983 and the 1984 filings by petitioner had contained false answers to the question about disciplinary proceedings, and that none of petitioner's defenses was meritorious. He noted in mitigation petitioner's "impressive record of past and present community activities and ample evidence of good character," quoting from the Appellate Division's prior decision in *In re Garner*, 103 A.D.2d 390, 392, 480 N.Y.S.2d 127, 128 (2d Dep't 1984), and the continued vitality of those characterizations (10a). He mentioned also that the OCC, knowing the facts, had not found the charges to be "of sufficient gravity to offset respondent's character and quality to be the chief executive office [sic] of what has grown to be a significant and successful National Bank." (*Id.*) But he found the charges to be sustained.

In resisting that conclusion, petitioner's counsel had preserved throughout the contention that the hearing had been unfair because of (i) the failure to effect compliance with his subpoena to the OCC, and (ii) the curtailment of his cross-examination resulting from the permitted refusal of the sole witness Lamson to answer questions bearing upon what the Referee had described as "the principal question" in the case. Prior to further briefing and argument to the Referee, at the close of the hearing petitioner's counsel moved unsuccessfully to strike Lamson's testimony on the ground that "he did not comply with the subpoena of [the] court, and he did not submit himself to cross-examination." (Tr. 307.)[7]

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[7] Petitioner also raised this due process argument in his post-trial memorandum. Respondent Gerald J. Garner's Post-Trial Memorandum 33-36.

PUBLISHER'S NOTE

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see also Greene v. McElroy, 360 U.S. 474, 496-97, 506-07 (1959).

In this case, the petitioner's right to cross-examine was gutted by permitting the single witness to refuse to answer questions that were recognized by the presiding judicial officer to be highly relevant to petitioner's defense. The Referee's acceptance of these refusals rests upon the clearly mistaken notion that a federal employee appearing in a state tribunal has a supreme right to determine what questions he will answer merely by his conversational announcement that the inquiries move into privileged terrain. The Referee's professed helplessness to require proper cross-examination answers, or to exclude the direct testimony, involves a tissue of misconceptions, and conflicts with other cases, discussed below. These misconceptions trigger questions of substance for this Court's consideration. The case as a whole is, in petitioner's submission, a significant one for review by this Court.

2. The procedure followed in this case is in conflict with the basic principle that when government officers (or the Government *eo nomine*) come voluntarily to court, they submit themselves to the procedures and rules that bind others. Enforcing the principle, and rejecting an attempt by the government to invoke a special procedure of mandamus or prohibition to attack a trial court's discovery orders in a case where the Government was sued with its consent, Judge Augustus Hand wrote for the Second Circuit:

> It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions.

Bank Line v. United States, 163 F.2d 133, 138 (2d Cir. 1947). The principle stated by Judge Hand applies in state as well as federal courts.

Accordingly, coming closer to this date, when the United States has proceeded in state court for an adjudication of its water rights, it has "admitted that it must abide by all state procedures that permit a fair determination of federal reserved water rights or risk losing them." *United States v. Bell*, 724 P.2d 631, 644 (Colo. 1986). *See also United States v. District Court*, 121 Utah 1, 15-16, 238 P.2d 1132, 1139 (1951), *rehearing denied*, 121 Utah 18, 242 P.2d 774 (1952); *Green River Adjudication v. United States*, 17 Utah 2d 50, 52, 404 P.2d 251, 252 (1965) (United States "bound by the judgment to the same extent as any other party"). The contrasting conception accepted by the New York courts in this case -- that the court must accept, without inquiry and without remedy for the private litigant, a federal employee's declaration of privilege -- should be considered and corrected by this Court.

The idea of so dominant a role for a federal employee testifying in a state court is a caricature of "'Our Federalism.'" *See Younger v. Harris*, 401 U.S. 37, 44 (1971). In *Younger*, as in other settings, this Court has been astute to enforce "a proper respect for state functions," recalling from the founding of the Republic "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* As against that fundamental premise, the courts below have enforced a self-denying ordinance of simplistic federal supremacy entitling a federal civil servant to dictate whether and how he may be cross-examined after supplying state disciplinary enforcers with his direct testimony. This unwarranted deference is profoundly objectionable, and intensely misconceived as a matter of

constitutional law, when the result is to trample upon the rights of individuals.

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

New York v. United States, 112 S. Ct. 2408, 2431 (1992).

3. Though not discussed by the New York appellate courts or explained by the Referee, his mechanical acceptance of the federal employee's refusals to answer rests upon a swollen conception of federal administrative supremacy that calls for correction by this Court and further explication of this Court's pertinent decisions. Specifically, such basic precedents as *Boske v. Comingore*, 177 U.S. 459 (1900), and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), among others, are distorted and over-extended by the unqualified power given to the federal witness to answer or not answer based upon his own untested judgments of confidentiality.

Boske v. Comingore is a germinal decision to revisit in correcting the decision below. That case established at the outset of the twentieth century that (i) a department head could lawfully preserve by regulation the confidentiality of departmental records, and (ii) a subordinate employee, called as an involuntary witness, could not be compelled by a state court to produce records in violation of the regulation. *Touhy v. Ragen* applied the same rule against similar coercion by a federal court. Neither those decisions nor any other supports the notion that a federal employee may be unleashed as a witness appearing voluntarily, and then have his selective

assertions of confidentiality accepted without scrutiny by the judicial officer before whom he testifies. On the contrary, related decisions on claims of federal privilege make plain that the Referee in this case abdicated judicial power to test such claims and neglected the duty to do so when a person's right to due process is at stake.

Even when the President of the United States asserts a settled form of executive privilege, the particular assertion must pass the test of judicial assessment and be rejected if it fails. *See United States v. Nixon*, 418 U.S. 683 (1974). The President himself is not free to withhold relevant evidence by invoking a "broad, undifferentiated . . . generalized . . . interest in confidentiality." *Id.* at 706-07. In submitting to the test, the President must make assertedly privileged papers available for judicial inspection -- contrary to the Referee's view in this case that he could not even look at subpoenaed papers because they were not "in evidence" (Tr. 83). Despite the "high respect to the representations made on behalf of the President," *id.* at 707, and the "presumptive privilege for Presidential communications," *id.* at 708, the interests of justice require a judicial weighing of the need for confidentiality against the need for the evidence. The "undifferentiated claim of public interest in [Presidential] confidentiality," *id.* at 706, must be weighed against the claims of due process, under which "it is essential that all relevant and admissible evidence be produced," *id.* at 711.

More recently, dealing with a similar claim of confidentiality, the Court has again noted the need for judicial scrutiny because "the privilege that has been held to attach to intragovernmental memoranda clearly has finite limits, even in civil litigation." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973).

Similarly, in the context of the "informer's privilege" -- the qualified right of the government to withold the identity

of confidential sources of information in order to preserve the flow of information to the government, seemingly a policy Lamson professed to be protecting in these proceedings -- the Court has stressed that "[t]he problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro v. United States*, 353 U.S. 53, 62 (1957) (holding denial of disclosure of informant's identity to be reversible error). *See also Hampton v. Hanrahan*, 600 F.2d 600, 637 (7th Cir. 1979) (reversible error to fail to apply *Roviaro* balancing), *rev'd in part on other grounds*, 446 U.S. 754 (1980); *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 769 (D.C. Cir. 1965) (rejecting argument that "the *Roviaro* standard would never justify disclosure in civil cases in which the Government is not a party. . . . The policies behind the [informer's] privilege and its exceptions extend to civil as well as criminal cases.").

The same is true with respect to the cognate subject of military and state secrets. Again, in that setting this Court has affirmed that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953). "The court itself must determine whether the circumstances are appropriate for the claim of privilege." *Id.* at 8. "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id.* at 11. Those principles were stated with respect to a specific claim of privilege by a cabinet officer.

The rulings of the Referee in this case, sustained by the Appellate Division and denied review by the Court of Appeals, cannot be reconciled with the quoted principles. Indeed, the contexts in which those principles were announced presented far more compelling cases for judicial deference to assertions of privilege. The witness appearing here, without

compulsion, was far below the agency head, who had no occasion to consider the specific refusals to answer questions on cross-examination. The Referee never examined the claimed need for confidentiality and made no attempt to weigh the opposing need for the evidence -- in a word, overrode the right of cross-examination on the witness's naked refusal to answer.

Similarly, as to the subpoenaed documents, the employee simply consulted with a colleague, made no effort to quash, brought those he deemed suitable, did some unexplained redacting, and otherwise defied the subpoena. Exercising no judgment whatever, the Referee yielded to the decisions of the employee, even while recognizing the relevance of the evidence thus withheld.[10] The result is a record made in a perverse violation of due process.

It is improbable that Lamson's claims of confidentiality would have survived a few moments of rational judicial inquiry.[11] But these are details not suited for submission to this Court; the issues on which review is sought go to the failure to make any inquiry whatever. In his cursory rejection

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[10] The unanswered questions, the Referee observed, went to the "principal question" in the case (Tr. 126-27). This was clearly correct. The Appellate Division -- with broad authority both to determine culpability and to adjudge sanctions ranging from censure to disbarment, N.Y. Jud. Law § 90(2) (McKinney 1983 & Supp. 1992) -- should undoubtedly have been interested to know whether the OCC had actually been misled, whether the oral encounters to which petitioner testified had in timely fashion obviated any possibility of deception, and whether the OCC itself had foregone any adverse action because it concluded on balance that there had been neither deception nor an intent to deceive.

[11] Consider, for example, the refusals to say when or if the OCC had ascertained that petitioner had given misleading information; what action, if any, the OCC had taken against petitioner; whether there had been any steps to remove petitioner as CEO of his bank; and whether penalties had ever been sought against petitioner.

of that course, the Referee once again ignored the need to weigh the competing interests, leaving the decision to the one-sided disposition of a subordinate employee. If a responsible agency head had addressed the question, as was required, *see Reynolds*, 345 U.S. at 7-8, and had found a concern about the leakage of confidences in relevant cross-examination, that might fairly have led to resisting any direct examination to begin with -- not to the cavalier allowance of prosecutorial direct while planning to refuse cross. *See Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1143-44 (5th Cir. 1992); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985). No responsible agency head proposed such unfairness here; the judicial sanctioning of the procedure merits examination by this Court in light of the divergence from state and federal precedents just cited.

4. In refusing to strike the direct testimony when the witness was permitted to withhold relevant evidence on cross-examination, the Referee's rulings are in essential conflict, both in result and lack of reasoning, with an array of state and federal decisions. For example, in *State v. Tascarella*, 580 So. 2d 154 (Fla. 1991), when Federal Drug Enforcement agents refused to give deposition testimony in a criminal prosecution, the trial court ordered the agents barred from testifying for the prosecution at the trial. Rejecting the State's appeal and holding the order a proper exercise of discretion, the Florida Supreme Court said: "It has long been held that states have full control over the procedural rules in their courts, in both civil and criminal cases." *Id.* at 156. That principle should have been followed, and a comparable result reached, in this case.

The denial of the motion to strike likewise diverges from the principles and rulings of federal cases dismissing both civil and criminal proceedings when the government insists upon its right to withhold relevant evidence. *United States v.*

Cotton Valley Operators Comm., 9 F.R.D. 719 (W.D. La. 1949), *aff'd by an equally divided Court*, 339 U.S. 940 (1950) (civil antitrust); *United States v. Rhodes*, 360 F.2d 865, 866-67 (7th Cir. 1966); *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) (L. Hand, J.).

5. The case is important. Despite the routine disposition and the silence below, the procedure employed against petitioner flatly transgressed the principles laid down in decisions of this Court cited earlier. Beyond the necessity for specific corrections in this respect, this is a useful occasion for further resolution of interrelated problems of federal privilege, state judicial power, due process, and federalism briefly outlined in the foregoing argument.

CONCLUSION

This petition for a writ of certiorari should be granted. Because the constitutional issues were neglected by both of New York's appellate courts, the case may be appropriate for summary disposition vacating and remanding for consideration of these issues.

Respectfully submitted

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